

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

**CORRECTED
COPY**

77-1294

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
JONATHAN J. SILBERMANN

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

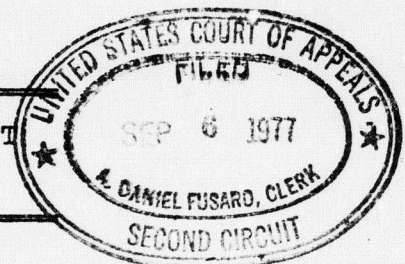
STEVEN HYATT,

Appellant.
-----X

Docket No. 77-1294

B p/s

BRIEF FOR APPELLANT
STEVEN HYATT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
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Questions Presented

1. Whether the rulings of the District Court and the actions of the prosecutor precluded appellant from preparing and presenting his defense to the jurors.
2. Whether the Government failed to prove that the crime of uttering, in violation of 18 U.S.C. §495, had been committed.
3. Whether the Assistant United States Attorney's improper and inflammatory examination of witnesses requires reversal.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher), convicting appellant Hyatt of five counts of uttering and publishing as true forged Government checks (Counts I - V) (18 U.S.C. §§495,2) and ten counts of possessing Government checks stolen from the mails (Counts VI - XV) (18 U.S.C. §§1708,2) and sentencing appellant to eighteen months' imprisonment on each count, the sentences to run concurrently.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment and Pre-Trial Proceedings *

On February 16, 1977, an indictment was filed charging appellant Hyatt and co-defendant Linda Andre with possessing ten Government checks stolen from the mails (Counts VI - XV) and uttering and publishing as true five of those checks (Counts I-V).

*The indictment is "B" to appellant's separate appendix. During trial co-defendant Andre was hospitalized, and a mistrial was declared as to her (T248-281). Numerals in parenthesis preceded by a "T" refer to pages of the trial transcript.

By notice of motion dated March 31, 1977, defense counsel moved, inter alia, for:

an order directing the United States Attorney to inform the defendant of the full name, address and whereabouts of the informant known as "Jimmy," his prior criminal record, the substance of all agreements between said informant and any governmental agency and the nature and amount of any consideration given to said informant by any governmental agency for the instant case as well as for any previous cases he was involved in; *

The Government refused to disclose the identity of the informant in order to protect the "confidentiality" of its sources (April 21, 1977 at 14,18).** Further, the Assistant United States Attorney stated that, while the informant "introduced the Government agent to the fact that the sale of the Government check(s) was about to take place," the informant was only a witness to the crime (April 21, 1977 at 14-15,22), and the Assistant United States Attorney represented that the first time the informant communicated with Agent Wilson was on the date of the sale, December 16, 1976 (April 21, 1977, at 24). Defense counsel disputed

*This motion, with counsel's supporting affidavit, is "D" to appellant's separate appendix.

**Numerals in parenthesis preceded by a date refer to pages of the transcript occurring on that date.

the Assistant United States Attorney's version of the facts, contending that the informant played a direct part in causing the sale and inducing appellant's participation in it;* that entrapment would be a major issue in the case; and that the defense should be allowed to interview the informant. (April 21, 1977 at 17-18, 20-21, 24-25, Affidavit of Philip Katowitz, Esq. at ¶7). Moreover, defense counsel indicated that despite their diligent efforts, defense investigators had been unable to locate the informant (April 21, 1977 at 25).

The District Court denied the defense motion and declined to direct the Government to disclose the informant's whereabouts. He ruled, in a most extraordinary statement:

The problem I have with [the defense of entrapment] is that the informant would not be here to prove the defense case because if he was indeed an informant who brought about the actions, he is certainly not going to say that your client was innocent and that he was guilty. Apart from that he would have to make admissions of statements in his testimony that would exonerate your client and there is a question whether that would be so. (April 21, 1977 at 28).

B. The Government's Case

At trial, the Government's theory was that appellant Hyatt, aided by co-defendant Andre, was guilty of uttering and possessing stolen Government checks by selling ten of those checks, five of which had been endorsed, to undercover

*Specifically, defense counsel stated that prior to the sale, the informant telephoned appellant numerous times, met with appellant, and arranged a sale in which appellant refused to participate (April 21, 1977 17, 20-21).

Postal Service Agent Sydney Wilson (T51-53).

Agent Wilson testified that on December 16, 1976 the unidentified informant telephoned him twice to arrange a sale of Government checks by a person named "Steve" (T151, 164-165). Pursuant to these arrangements, Agent Wilson drove to a McDonald's parking lot on Springfield and Linden Boulevards in Queens, New York (T152-153). Arriving at the parking lot, the agent saw the informant, whom he had met before (T166), and parked the car nearby. Wilson testified that appellant Hyatt got into the rear of the agent's car, while the informant sat in the front, next to the agent (T154-155). Agent Wilson stated that after a short conversation, appellant left the car, returning with an envelope containing ten Government checks (T155-156). The agent testified that he offered to purchase the checks for 25% of their face value and that appellant accepted those terms. Agent Wilson then left the car, whereupon appellant was arrested (T157-158, 167,169).

On cross-examination Agent Wilson indicated that as part of the prearranged plan, both he and the informant were also taken into custody at that time, and placed in a cell with appellant Hyatt (T159-161). Further, the agent stated that after his release, he drove the informant home (T161). The District Court then sustained objections to questions relating to Agent Wilson's prior dealings with the informant.*

*Specifically, objections to the following three questions were sustained:

"Q: Had you been familiar with this source before?"

"Q: Had you had occasion to see this man before?"

"Q: Had you had occasion to work for this man before?"

(T162)

Postal Inspector James C. Cole confirmed Agent Wilson's testimony that the agent had previously met with the informant "on several occasions" (T113,135-136). However, the District Court again sustained objections to questions designed to explore the Government's relationship with the unidentified informant (T126-127).*

Seven of the payees of the Government checks, which were the subject of the indictment, also testified as part of the Government's case.** Thus, Mary Carter testified that she never received G.X. 18, *** a supplemental security income (SSI) check which bore her name and which had previously been admitted in evidence. Further, she testified that she was a widow and that she received SSI checks because she was disabled from arthritis and high blood pressure (T72-73). Similarly, Genevieve Robinson testified that she was 63 years old and received SSI checks because of her inability to work due to a heart condition (T75). ****

* Similar objections were sustained to questions posed to Secret Service Agent Nicoletti (T263-246). However, Agent Nicoletti did reveal that a rough draft of his report on the case stated that the Postal Service "had arranged a check buy " (T293).

** A stipulation as to the testimony of the other payees was read to the jurors (T101-102).

*** Numerals preceded by "GX" refer to the number of the Government's exhibit in evidence.

**** Mrs. Robinson stated that she never received GX14, a check for which she was the payee, or authorized anyone to endorse it (T76).

After Frederick Willerford stated that every month he received compensation from the Government for disability benefits caused by his service with the Armed Forces and that he never received the check entered in evidence as GX20 (T79-80), a side-bar ensued.

Defense counsel requested that the District Court preclude the Assistant United States Attorney from asking the payees about their disabilities and the reasons for receiving the checks in question (T82). The District Court sustained defense counsel's objections, stating, "The check speaks for itself. It is a Treasury check for government benefits...I don't think we need to prolong it by asking the purpose of the check..." (T84). Despite this caution, the Assistant United States Attorney insisted on asking payee Herve Joseph the following question:

"Q: And for what purpose do you receive that check, sir?"

Joseph answered, "I have had a nervous breakdown" (T90). At the conclusion of Joseph's testimony, another side-bar occurred at which defense counsel again objected to "inflamatory questions" asked by the Assistant United States Attorney "in contravention of [the Court's] ruling" (T91). Despite this objection and the Judge's prior rulings, the Assistant United States Attorney for the fifth time attempted to elicit this inflammatory and irrelevant information. Thus, he asked Cecilia Martinez whether the SSI payments she received were one of the primary means of her support.

The following colloquy then occurred:

Mr. Katowitz: I am requesting a side-bar conference, your honor.

The Court: I understand. I don't think we need it and I will caution counsel that it isn't necessary.

Do you understand?

Mr. Teitler [The Assistant United States Attorney]: Yes, your honor.

(T96)

After Martinez concluded her testimony, defense counsel moved for a mistrial on the ground that the payees' testimony about the reasons for receiving SSI payments had irretrievably prejudiced the case. Defense counsel explained:

Mr. Teitler [The Assistant United States Attorney] has taken witnesses who simply should testify to the fact that they never gave anyone permission or authority for anyone to cash these checks and they have never received them. And he has turned this into extremely prejudicial testimony...

(T98).

Although the District Court agreed with the defense position, the motion for a mistrial was denied, and no cautionary instruction was given (T99).

At the conclusion of the Government's case,* defense counsel moved to dismiss the uttering counts on the

*Written post-arrest statements by the co-defendant Andre (GX27) and appellant Hyatt (GX29) were also introduced in evidence as part of the Government's case. Andre stated that she brought the checks to the parking lot in her pocketbook (T185-186). Appellant Hyatt's statement indicated that an individual named Bunny had given appellant the checks which were the subject of the indictment. Bunny had wanted appellant to deposit the checks in appellant's bank account, but appellant refused. Further, according to the statement, appellant had said that:

Once [he] introduced the parties who would purchase the checks [he] waited to receive payment for the transaction.

(T190-191)

ground that the Government failed to prove that appellant had committed that crime (T303). Ruling that there was sufficient proof that appellant had uttered the checks to Agent Wilson, the District Court denied the motion (T304).

C. The Defense Case

Appellant Hyatt testified on his own behalf. In accord with his previously disclosed position, appellant did not deny that he had attempted to sell checks to Agent Wilson, but claimed that he had been entrapped by an informant he knew as "Jimmy." Appellant testified that he first met Jimmy -- a drug addict -- at a friend's house in November, 1976 (T306, 349-350). There, the informant asked appellant if he knew anyone who "did checks" or if appellant himself could get checks. Appellant told the informant that he was not interested in dealing in checks (T306; 369-370).

Appellant then testified that the informant was not satisfied with appellant's immediate refusals. Rather, the informant repeatedly telephoned Laura Tomkins -- the co-defendant's mother -- in whose house appellant was living at the time (T383), in an attempt to communicate with appellant about selling checks. Appellant finally spoke to the informant in order to stop him from bothering Ms. Tomkins. During this conversation, the informant repeatedly asked that appellant supply checks which could be sold for profit (T306-307).

Appellant testified that in December, 1976, he saw the informant a second time sitting in a car, near where appellant

lived. There, the informant told appellant that the informant was selling checks "all the time" and making money and that appellant should take advantage of the informant's connections (T307-308,371). Appellant stated that he did not want to get involved (T371).

Shortly after appellant had seen the informant this second time, he drove an acquaintance named Bunny to a hotel where Bunny was staying. During the ride this person, who was a customer at the coffee shop where appellant worked and who appellant had known for a number of years (T349-351), offered checks to appellant. Appellant testified that because the informant had been pressuring him, and in order to stop the informant from bothering appellant, as well as appellant's friends, appellant took the checks to give to the informant (T309-310, 360, 368, 370, 374, 381).

Appellant stated that the informant then telephoned him and told appellant that a deal had been set up just for appellant, but that appellant had "blown it." Further, the informant indicated that arrangements for a sale of checks would be made for Monday, December 13, 1976. However, at that time appellant was "dead against" the deal and did not meet with the informant. In a telephone conversation that day, the informant told appellant that he was furious at appellant's refusal to deal in checks and that a sale would be arranged for Thursday, December 16 (T312-313). Further, the informant assured appellant that the informant "would do all the business" and that "all [appellant] had to do is be there" (T315). During that sale, the informant introduced Agent Wilson

as "his man" (T313-314).

As evidence corroborative of appellant's version of the events, appellant explained that on the reverse side of GX25, a piece of paper seized from appellant at the time of the arrest, the informant had written his telephone number and the message "I can only get it through with him in the morning." Appellant stated that this message, written by the informant, was the informant's instructions to telephone him in the morning (T314-315).*

During appellant's cross-examination, a side-bar occurred at which the District Court indicated that in light of appellant's direct testimony, he might have been in error in failing to require the prosecutor to disclose the informant's name (T342, 345). In response, the Assistant United States Attorney now agreed to produce the informant (T344).

The following day, May 4, 1977, the informant was produced. At that time the Assistant United States Attorney requested that he be allowed to attend defense counsel's interview of the witness. The prosecutor stated:

Judge, I believe I have a right to be present, I am the Assistant United States Attorney who is prosecuting the case and this man [the informant] has been produced voluntarily by me. I have the right to listen and to hear what Mr. Katowitz [defense counsel] asked him so I can advise the witness how to answer.

(T399).

The District Court ruled that defense counsel could interview the informant outside the Assistant United States Attorney's

*A few days later appellant tried to return the checks to Bunny, but Bunny refused to take them (T310, 371).

presence but that defense counsel had to inform the witness that the Assistant United States Attorney was nearby and available for consultation should the need arise. Further, the trial judge told the prosecutor that the Government would be given the opportunity to interview the informant to determine whether it would call the informant as a rebuttal witness (T401).

After a short recess, outside the jury's presence, the prosecutor informed the District Court that he had "terminated" defense counsel's interview of the informant (T404). In disregard of the judge's prior rulings, the Assistant United States Attorney explained that he walked into the interview room. There, he was told by the informant that defense counsel had attempted to elicit the informant's address and prior arrest record.*

Defense counsel explained that he began the interview by asking for the informant's pedigree, his name, age, date of birth and address, but that the informant never disclosed his address. Then, defense counsel started questioning the informant about the events involved in the case but was interrupted by the prosecutor. Further, defense counsel told the judge that he took notes during the interview and would gladly give them to the Assistant United States Attorney to examine (T404-406). Moreover, counsel complained that he did not have an adequate opportunity to interview the informant and explained that because of this lack of opportunity, he was unable to determine whether to have the informant testify as

*No claim was made that the informant had actually divulged his address (T403).

part of appellant's case. Defense counsel stated:

I do not intend to [call the informant]
because I haven't had the opportunity to
speak with him.

(T407).

Ignoring defense counsel's statements that the Assistant United States Attorney had precluded any reasoned decision on the question of whether to call the witness, the District Court ruled that there was no justification for continuing the interview (T407-408).*

Defense counsel then indicated that he had one additional witness who would testify on appellant's behalf. The Assistant United States Attorney demanded that the defense give an offer of proof as to the witness' testimony. Instead of permitting the defense to call its witness, the court acceded to the Government's totally unjustified demand and required the defense to make an offer of proof. Pursuant to the court's ruling, counsel stated that the witness would testify to the fact that calls were received from an individual who said his name was Jimmy and that these calls were repeatedly made on the witness' phone (T409). The Assistant United States Attorney objected to this witness on the ground that the proffered testimony constituted a voice identification which was inadmissible, unless the witness could identify the voice and authenticate the identification (T409). Over vigorous defense objection that voice identification was not involved (T410), the District Court held that the defense witness would not be allowed to testify (T412).

*The informant did not testify as part of the Government's case.

D. The Summation and Charge

During his summation, the Assistant United States Attorney, over defense objection, rhetorically asked the jurors whether there were victims to the crime charged (T463). In answering the question he had posed, the Assistant United States Attorney argued that the payees were the victims, reminding the jurors that one of the payees, Mary Carter, was a disabled widow who suffered from arthritis and who received SSI Payments to meet her living expenses (T464, 466-467).

After the District Court's charge, rereading portions of the trial testimony, and deliberations, the jurors found appellant guilty as charged.

ARGUMENT

point I

THE RULINGS OF THE DISTRICT COURT AND
THE ACTIONS OF THE PROSECUTOR PRECLUDED
APPELLANT FROM PREPARING AND PRESENTING
HIS DEFENSE TO THE JURORS.

Appellant did not deny the Government's claim that he had attempted to sell Government checks to Agent Wilson. Rather, appellant's testimony showed that he had done so only because of, and in an effort to stop, the informant's constant and incessant badgering of appellant and appellant's friends and even after appellant had refused the informant's entreaties on a number of occasions. However, the conduct of the prosecutor and the district judge produced a situation in which appellant was simply unable to investigate and to produce evidence which actually existed to prove his claim of entrapment.

- A. The District Court erroneously failed to compel the Government to make pre-trial disclosure of the informant's identity and produce him for trial.

Prior to trial, defense counsel requested that the Government be required to divulge the name and whereabouts of the informant involved in this case. Counsel explained in his supporting affidavit that a defense of entrapment would be raised and that proper preparation for trial necessitated the interview of the informant and the investigation of any

relevant facts he might provide. Without any factual basis for his assertion, the Assistant United States Attorney argued against this request, asserting the need for "confidentiality." The District Court denied the request, ruling "that the informant would not be here to prove the defense case because if he was indeed an informant who brought about the transactions, he is not to go to say [the defendant] was innocent and that he was guilty" (April 21, 1977 at 28). The Government's argument against disclosure and the reason for the district judge's ruling are contrary to the applicable legal principles. By failing to require the Government to disclose the whereabouts of the informant, who subsequent events showed was within the Government's control, the District Court precluded critical pre-trial preparation of appellant's defense and prevented trial counsel from learning the most relevant information about it.

Fundamental principles of due process and fairness require that the Government disclose the informant's identity when helpful and relevant to the defense of the accused:

Where the disclosure of an informer's identity...is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege [of non-disclosure] must give way.

Roviaro v. United States,
353 U.S. 53, 60-61 (1957).

While this test requires the balancing of Government non-disclosure against the right to prepare a defense, and ultimately depends upon the facts of each case, United States v.

Turbide, Doc. No. 76-1533-34, slip op. 4341, 4353 (2d Cir. June 22, 1977); Roviaro v. United States, *supra*, 353 U.S. at 62; see, e.g., United States v. Edmonds, 535 F.2d 714, 718 (2d Cir. 1976); United States v. Morell, 524 F.2d 550, 557 (2d Cir. 1975); United States v. Soles, 482 F.2d 105, 109 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973); United States v. Russ, 362 F.2d 843, 844-845 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966), disclosure is especially critical where, as here, the defense of entrapment is raised at trial and actually presented to the jurors for their determination. United States v. Leon, 487 F.2d 389, 392-393 (9th Cir. 1973); United States v. Barnes, 486 F.2d 776, 778-789 (8th Cir. 1973); Lopez-Hernandez v. United States, 394 F.2d 821 (9th Cir. 1968); Velarde-Villarreal v. United States, 354 F.2d 9, 12 (9th Cir. 1965); United States v. White, 324 F.2d 814 (2d Cir. 1963). See also, United States v. Super, 492 F.2d 319, 322-323 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974). Under these circumstances the law is clear that the defense is entitled to "the informer's name, such information as the Government may have concerning his whereabouts, and reasonable cooperation in securing his appearance." United States v. Turbide, *supra*, slip op. at 4355. Accord, United States v. D'Angiolillo, 340 F.2d 453, 455 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965); United States v. Ortega, 471 F.2d 1350, 1358 n.2 (2d Cir. 1972); United States v. Roberts, 388 F.2d 646, 648-649 (2d Cir. 1968).

In complete disregard of these elementary rules, designed to assure appellant a fair trial, the prosecutor here was arbitrarily allowed to shield the informant's identity even after it had been made abundantly clear that his testimony might very well be critical to the issue of entrapment. Indeed, the subsequent events relating to the production of the informant show that the Government's initial claim of confidentiality was, at best, interposed frivolously, and at worst, an attempt to interfere with the defense preparation of its case and its presentation to the jury.

While the district judge's denial of the pre-trial disclosure of the informant on the unjustified assumption that the informant would not exonerate appellant was extraordinary, even if true, counsel still should have been accorded the opportunity to examine the informant prior to trial to prepare his case. This would have allowed the discovery of such crucial information as the location from which the informant had telephoned appellant; whether anyone had overheard these telephone conversations or the meetings between appellant and the informant, and whether anyone known to the informant could corroborate appellant's version of them; whether the informant had a prior criminal record; whether the informant was the subject of pending criminal charges or had been a target of any prior investigation; and whether the informant expected any benefits from the Government for his participation in the scheme and, of course, the extent of

any benefits.*

B. The District Court erroneously precluded proper cross-examination.

Not only did the District Court's decision prevent the pre-trial preparation of the entrapment defense, but its later rulings on the scope of cross-examination of the Government agents similarly prevented the discovery of extremely relevant information at trial. Indeed, any attempt to explore the Government's relationship with the informant-obviously crucial information-through cross-examination of the Government's own witnesses was summarily cut off (T162, 263-264).

C. The prosecutor obstructed defense counsel's interview of the informant.

After hearing appellant's direct testimony, the District Court, in the course of a side-bar, indicated that he may have erroneously failed to require the informant's disclosure. As a result, the following day at the close of the defense case, the Assistant United States Attorney, without difficulty, produced the informant ostensibly to allow defense counsel to interview the witness. At that time, however, the prosecutor demanded that he be allowed to attend defense counsel's interview of the informant in order to give the informant advice.

*Moreover, pre-trial access to the informant would have allowed counsel to determine whether to call the informant as a witness, even if the informant's testimony was unfavorable. If this were so, counsel still might have decided to have the informant testify anyway and by impeaching the witness, attempt to convince the jurors that the contrary of the testimony was true. Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

The District Court rejected this request, telling defense counsel to inform the witness that the prosecutor would be available for consultation should it be necessary (T401).^{*} After a short time however, the Assistant United States Attorney, in violation of the court's directive, went into the witness room and "informed [defense counsel he] was terminating the interview at that time" (T404). This action was violative of the relevant case law on the question, as well as the pertinent standards governing proper prosecutorial conduct.

In light of the defense claims, the identity of the informant should have been disclosed prior to trial. However, once the informant was produced, the Assistant United States Attorney was then duty-bound not to obstruct defense counsel's interview^{**} and attempts to elicit relevant facts.^{***}

^{*}The District Court's decision on the conditions of the interview was fully in accord with the relevant law. See ABA Standards Relating to the Prosecution Function and the Defense Function §3.1(c) (Approved Draft, 1971) (hereinafter referred to as "ABA Standards").

^{**}As the Supreme Court has forcefully stated:

[O]nce the identity of the informant has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

Roviaro v. United States,
supra, 353 U.S. at 60.

Compare United States v. Turbide, supra, slip op. at 4353.

^{***}While the prosecutor vociferously accused defense counsel of attempting to determine the informant's address "for no other conceivable reason than perhaps to locate this man or to find out where he is and to turn over his address to the defendant" (T404), defense counsel explained that he began the interview by attempting to elicit the informant's pedigree, which included his address, and (Footnote continues on next page).

A prosecutor should not obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct to advise any person to decline to give information to the defense.

ABA Standards, supra,
§3.1(c).

See also, United States v. Miller, 381 F.2d 529, 538 n.7 (2d Cir. 1967). United States v. McCarthy, 292 F. Supp. 937, 946 (S.D.N.Y. 1968).

As the District of Columbia Circuit eloquently stated in Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966):

[W]e know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence...In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of...'[a] lawyer...interview[ing] any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.' Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision....

A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined....

These principles were "wholeheartedly" endorsed by this Court in International Business Machines Corp. v. Edelstein, 526 F.2d 27,

(Footnote continued from preceding page).

that the informant never disclosed his address. Thus, the prosecutor's fears were without basis. Further, to assuage the prosecutor's worries, defense counsel offered to give to the prosecutor the notes that had already been taken (T407).

43-44 (2d Cir. 1975). Indeed there, the Court made clear that the right to effective counsel in criminal, as well as civil, matters embraces the right to interview any witness or prospective witness, even absent the consent of opposing counsel.

The prosecutor's actions in this case violated these basic principles of fairness. While the Government initially improperly refused to disclose the informant's identity, when it finally produced the witness, the defense had an absolute right to speak freely with him. Further, because the Assistant United States Attorney thereafter obstructed defense counsel's communication with the informant, counsel was unable to determine whether the witness should have been called to provide further proof of appellant's entrapment defense and to explore fully the relevant facts. Thus, the informant's ultimate production did not cure the initial error caused by the Government's prior failure to disclose.

Indeed, after first refusing to divulge the informant's whereabouts, and then producing him but precluding defense counsel's legitimate questioning of the witness, the Government was allowed to take advantage of its misconduct. In a ruling extraordinary in light of the prosecutor's own conduct, the district judge erroneously found that the Government had sufficiently complied with its duty to produce, precluded defense counsel from arguing the informant's non-production to the jurors, and refused to give an instruction that an unfavorable inference could be drawn against the Government for its failure to produce (T397-398) -- an instruction to which the defense would otherwise be entitled. See e.g., Wigmore,

On Evidence, §285 et. seq. (3rd ed. 1940); Labuy, Jury Instructions, §6.17 at 73 (1965).

D. The District Court refused to admit the testimony of a defense witness who would have supported the defense theory of the case.

Defense counsel had substantial evidence supporting appellant's testimony that he had been entrapped into committing the crimes charged and that the informant had telephoned appellant numerous times in order to do so. The evidence was the testimony of the witness whose telephone had been involved, and she was to testify that a person calling himself Jimmy had repeatedly telephoned appellant at that number. The District Court precluded this witness from testifying on the ground that the proof was hearsay and an attempt to elicit voice identification testimony without proper authentication. This decision is so contrary to applicable law as to be inexplicable.

The proffered testimony was relevant to support appellant's claim that he had, in fact, been telephoned by a person calling himself Jimmy and to corroborate appellant's testimony on the point. It was admissible on at least three different theories. First, the evidence was not inadmissible hearsay because it was not "offered in evidence to prove the truth of the matter asserted." Federal Rules of Evidence, Rule 801(c). Rather, it was being used to prove that the proposed witness answered the telephone and that a man calling himself Jimmy was at the other end. Thus, it was not used to prove that Jimmy called, but what the witness heard. This Court has unequivocally approved the admission of testimony

employed for this purpose. United States v. Canieso 470 F.2d 1224, 1232 (2d Cir. 1972), quoting 6 Wigmore, Evidence, §1766 at 180 (3rd ed. 1940) (testimony) admissible if offered "circumstantially as giving rise to indirect inferences, but not as assertions to prove the matter asserted").

Second, the testimony was admissible as non-hearsay evidence on the theory that it would have supported the inference of a relationship between appellant and the informant. United States v. Head, 546 F.2d 6, 9 (2d Cir. 1976); United States v. Panebianco, 543 F.2d 447, 457 (2d Cir. 1976); United States v. Ruiz, 477 F.2d 918, 919 (2d Cir.), cert denied, 414 U. S. 1004 (1973); United States v. Ellis, 461 F.2d 962, 970 (2d Cir.), cert denied, 409 U.S. 866 (1977).

Third, even if considered a voice identification, the relevant circumstances provide sufficient authentication to allow the witness' testimony. Contrary to the clear implication of the District Court ruling, it is not required that the voice in question be identified only by a participant in the conversation. Indeed, "the requirement of direct recognition of the voice is not...an inexorable rule. Circumstantial evidence may be sufficient to identify the speaker."

United States v. Fassoulis 445 F.2d 13, 17 (2d Cir), cert denied, 404 U.S. 858 (1971), quoting United States v. LoBue, 180 F. Supp. 955, 956 (S.D.N.Y. 1960). See also, United States v. Zane, 495 F.2d 683, 698 (2d Cir 1974); United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973); Van Riper v.

United States, 13 F.2d 961, 968 (2d Cir.), cert. denied, 273 U.S. 702 (1926).

Here, the circumstances to which appellant testified were more than sufficient to justify the admissibility of the witness' testimony. Thus, appellant, who had heard the informant speak and could recognize the voice (see e.g., Federal Rules of Evidence, Rule 901(a) and (b)(5); United States v. Albergo, 539 F.2d 860, 863-864 (2d Cir. 1976)) had previously testified that the informant had attempted to telephone him numerous times at the witness' home in an attempt to induce participation in criminal activities. This testimony, combined with the witness' proof that a person calling himself Jimmy had actually telephoned appellant, satisfied any possible authenticity problem. Any other question as to the reliability of the identification and the weight to be accorded to it was for the jury's determination. United States v. Albergo, supra, 539 F.2d 864-865; United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Borrone-Iglar, 468 F.2d 419, 421 (2d Cir. 1972).

The rulings by the District Court on the questions involved were simply incomprehensible and contrary to established precedents. Each of the claimed errors -- the failure of the Government to disclose the informant, the District Court's rulings on cross-examination, the prosecutor's obstruction of the interview of the informant, and the preclusion of defense testimony -- is, of itself, sufficient to require reversal. However, their combined

effect clearly precluded appellant's preparation of his case and unfairly prejudiced his ability to present it to the jurors. Accordingly, a new trial is required.

POINT II

THE GOVERNMENT FAILED TO PROVE THAT THE
CRIME OF UTTERING, IN VIOLATION OF 18 U.S.C.
§495, HAD BEEN COMMITTED.

Appellant was charged with five counts of uttering and publishing as true five forged United States Treasury checks in contravention of 18 U.S.C. §495. In order to constitute a violation of this crime "there must be some attempt to circulate the check by means of a fraudulent representation that it is genuine." United States v. Brown, 495 F.2d 593, 597 n.4 (1st Cir.), cert. denied, 419 U.S. 965 (1974); 2 Wharton's Criminal Law and Procedure, §650 at 441 (Anderson ed. 1957) ("A forged instrument is uttered when it is offered as genuine, accompanied by words or conduct indicating that it is genuine, without regard to whether it is so accepted."); see also, United States v. Maybury, 274 F.2d 899, 403-404 (2d Cir. 1960). To the contrary, the Government's proof showed that this required representation was never made. Indeed, the evidence is clear that the opposite occurred here.

At trial, the Government's theory was that appellant had, in violation of 18 U.S.C. §495, uttered U.S. Treasury checks by his attempted sale of those checks to Agent Wilson on December 16, 1976. (T 303-304). To sustain this theory, the Government relied on the agent's testimony, as well as observations by other agents. The proof showed that the attempted sale occurred in a parked car in a MacDonald's parking lot in Queens, New York.

Further, the agent directly involved testified that appellant stated he had some checks he wanted "to get rid of" (T 155). Moreover, the agent testified that after some preliminary conversation, he offered to purchase the checks for 25% of their face value (See United States v. Jacobs, 475 F.2d 270, 281 (2d Cir.), cert. denied, sub nom, Lavelle v. United States, 414 U.S. 821 (1973)), and that appellant agreed to those terms. These circumstances -- the clandestine nature of the meeting and sale, the purchase of Government checks for 25% of their full value -- unmistakably show that appellant made no representation as to the validity of the checks that he attempted to sell. Accordingly, the Government's proof failed to show a violation of the crime charged, and the uttering counts must be dismissed.*

*Even if no error is found requiring reversal of the possession counts (Counts VI-XV), the uttering counts must be dismissed in any event and the case remanded for resentencing, despite the imposition of concurrent sentences on all counts. Since a conviction for uttering carries a longer maximum sentence (ten years) than does one for possession (five years), to insure that the sentence on the possession counts was not affected by the sentence on uttering, a sentence is required. United States v. Rivera, 521 F.2d 125, 129 (2d Cir. 1975); United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973); McGee v. United States, 462 F.2d 243, 246 (2d Cir. 1972).

POINT III

THE ASSISTANT UNITED STATES ATTORNEY'S IMPROPER AND INFLAMMATORY EXAMINATION OF WITNESSES RE- QUIRES REVERSAL.

Seven of the payees of the Government SSI checks involved in this case testified that they never received the checks in question. After the Assistant United States Attorney elicited from three of these individuals the reasons for their receipt of the money -- disability due to arthritis, high blood pressure (Mary Carter); heart condition (Genevieve Robinson); service in the armed forces (Frederick Willerford) -- defense counsel's objections to this line of questioning were sustained. However, despite the judge's ruling, the Assistant United States Attorney persisted in asking payee Herve Joseph the purpose for his receiving his check. His reply, because of a nervous breakdown, caused counsel to object on the ground that the question had been asked in contravention of the judge's prior ruling and to request the court again to instruct the prosecutor to refrain from inflaming the jury's passions. Despite these cautions, the prosecutor persisted, asking yet another payee whether the SSI payments were one of her primary means of support.*

The prosecutor's questioning of its own witnesses, not relevant to any substantive issue in the case, could only have been

*The prosecutor's questioning prompted defense counsel to move for a mistrial, a motion which was denied (T 98).

designed to appeal improperly to the jurors' passions. This intention was unmistakably made clear by the Assistant United States Attorney's reference to the testimony in his summation, despite the District Court's prior instructions to refrain from eliciting information about the payees' various ailments which required public assistance. See United States v. Drummond, 481 F.2d 62, 63 (2d Cir. 1973). Thus, the Assistant United States Attorney argued, over objection, that while the crime was committed against the Government, the real victims were the payees who had testified, reminding the jurors that one of them was a disabled, arthritic widow who needed payments to meet her living expenses.

The testimony that was elicited was extremely prejudicial and totally improper. Moreover, its inflammatory effect was reinforced by the prosecutor's summation. Accordingly, reversal is required. See United States v. Miller, 478 F.2d 1315, 1317-1318 (2d Cir. 1973).

Conclusion

For the foregoing reasons, the judgment of the District Court must be reversed with directions to dismiss Counts I-V with prejudice and a new trial ordered on Counts VI-XV.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Sept 6, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan Silbermann